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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-

CARPENTERS DISTRICT COUNCIL OF DETROIT, WAYNE, OAKLAND AND MACOMB COUNTIES AND VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, a voluntary unincorporated labor organization, and the THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS, a trust fund established under, and administered pursuant to, federal law,

Petitioners,

v.

GEORGE E. MORSE, individually and d/b/a RESIDENTIAL FRAMERS COMPANY, BRIGHTON MALL APARTMENTS, a Michigan limited partnership, and LAWRENCE PROPERTIES, INC., a corporation incorporated under the laws of the State of Michigan,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CITATIONS

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Petitioners, the Carpenters District Council of Detroit, Wayne, Oakland and Macomb Counties and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO[1] and the Detroit Carpenters Fringe Benefit Funds, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on the 13th day of June, 1979, as amended by the Court of Appeals, on July 23, 1979, in its Order which denied the petition for rehearing.

[1] Hereinafter, "Carpenters' Union".

Citations to Opinions Below

The Orders of the Court of Appeals of June 13, 1979, and July 23, 1979, both of which are unreported, appear in the appendix to this petition. The District Court's Memorandum Opinion (of September 27, 1976), Order [of Dismissal] (of October 18, 1976) and Order for Rule 54(b) Certificate (of October 20, 1976), all of which are unreported, also appear in the appendix to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on June 13, 1979. An application for rehearing was filed on June 22, 1979. On July 23, 1979, the Court of Appeals entered an order denying rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Where a pendent claim (although involving defendants not subject to the federal claim) was an integral part of the federal claim, did the District Court abuse its discretion in refusing to decide the pendent claim?

2. Where a remedy established by state law was used for the purpose of securing satisfaction (in whole or in part) of a federal labor claim, was the District Court required by Federal Rule of Civil Procedure 64 to decide the pendent claim?

Statutes and Rule Involved

1. Federal Rule of Civil Procedure 64 provides:

> "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, * * * The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, *and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action*" (emphasis added).

2. The Michigan mechanics' lien law, PA. 1891, No. 179, as amended, M.C.L.A. §§570.1, et seq. (M.S.A. §§26.281, et seq.), provides, in relevant parts, as follows:

(i) Section 1: "Every person who shall, in pursuance of any contract, express or implied, written or unwritten, existing between himself as contractor, and the owner, part owner or lessee of any interest in real estate, . . furnish any labor or materials in or for building, altering, improving, repairing, erecting, ornamenting or putting in any . . . building . . . and every person who shall be . . . laborer . . . perform any labor or furnish materials . . . to such original or principal contractor, or any subcontractor, in carrying forward or completing any such contract, shall have a lien therefor upon such . . . building . . . to the extent of the right, title and interest of such owner, part owner or lessee at the time work was commenced . . . and also to the extent of any subsequent acquired interest of any such owner, part owner or lessee. . . ." M.C.L.A. §570.1 (M.S.A. §26.281)

(ii) Section 5: "Every person, *or his agent or attorney,* whether contractor, subcontractor, materialman or laborer, who wishes to avail himself of the provisions of this statute, shall make and record in the office of the register of deeds . . . a just and true

statement or account of the demand due him over and above all legal setoffs, setting forth the time when such materials were furnished or labor performed, and for whom, and containing a correct description of the property to be charged with the lien, and the name of the owner, part owner or lessee, if known, which statement shall be verified by affidavit. * * * *" M.C.L.A. §570.5 (M.S.A. §26.285), emphasis added.

(iii) Section 10: "Proceedings to enforce such lien shall be by bill in chancery, under oath, and notice of lis pendens recorded in the office of the register of deeds, shall have the effect to continue such lien pending such proceedings. * * * *" M.C.L.A. §570.10 (M.S.A. §26.290).

(iv) Section 25: "All liens or claims for liens which may arise or accrue under the terms of this act shall be assignable, and proceedings to enforce such liens may be maintained by and in the name of the assignees, who shall have as full and ample power to enforce the same as if such proceedings were taken under the provisions of this act by and in the name of the lien claimant [claimants] themselves. * * *" M.C.L.A. §570.25 (M.S.A. §26.305).

3. Section 1 of the Michigan Builders Trust Fund Act, P.A. 1931, No. 259, as amended, provides:

"In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes." M.C.L.A. §570.151 (M.S.A. §26.331).

Statement of the Case[2]

Pursuant to a collective bargaining agreement which George Morse,[3] a contractor in the construction industry, had entered into with the Carpenters' Union, a labor organization representing employees in an industry affecting commerce, Morse was required to make contributions to provide pension, holiday and health and welfare benefit coverage for those of his employees who were represented by the Carpenters' Union. Under the contract, payment of such contributions should have been made to the Detroit Carpenters Fringe Benefit Funds, a trust fund established under, and administered pursuant to, Section 302 of the Labor-Management Relations Act of 1947, as amended, hereinafter "LMRA", 29 U.S.C. §186, and the Employee Retirement Income Security Act of 1974, hereinafter "ERISA", 29 U.S.C. §§1001, et seq. The contractor failed to make the contributions for fringe benefits[4] and the Carpenters' Union and the Detroit Carpenters Fringe Benefit Funds instituted suit against him under LMRA §301, 29 U.S.C. §185 (R5-R7; R32-R34).

Counts I and II of the Complaint (R5-R8) sought relief against Morse. He did not defend and, on June 30, 1975, his default was entered (R14-R17). Subsequently, as pre-

[2] Unless the context indicates otherwise, parenthetical references preceded by "R" refer to the pages of the Plaintiffs-Appellants' Appendix filed with the Court of Appeals.

[3] Morse, who did business as Residential Framers Company, was a defendant in the District Court. While the lawsuit was pending there, he was adjudicated a bankrupt and the proceedings were stayed as to him (R32). That stay has never been lifted.

[4] Contributions are payable for each hour worked by each carpenter. The right of the carpenter and his family to coverage for medical, hospital, pension, optical, dental, pooled holiday and other benefits are entirely dependent upon proper payment of contributions by employers. Participation in plaintiffs' programs is a significant part of the bargained-for compensation of carpenters and an important aspect of their families' economic security.

viously mentioned,[5] he was adjudicated a bankrupt and all proceedings against him were stayed.

All of the contractor's indebtedness accrued during the course of a construction project that he had performed for Lawrence Properties, Inc., a Michigan corporation, the general contractor, on land owned by Brighton Mall Apartments, a Michigan limited partnership. To protect the interests of Morse's carpenter-employees with respect to their fringe benefits, the Carpenters' Union, pursuant to Section 5 of Michigan's mechanics' lien law, M.C.L.A. §570.5 (M.S.A. §26.285), recorded a mechanics' lien on the aforementioned realty. Count IV of the Complaint sought to foreclose that lien (R10-R12).

Count III of the Complaint (R8-R10) sought to recover against Brighton Mall Apartments and Lawrence Properties, Inc., under the Michigan Builders Contract Fund Act, M.C.L.A. §§570.151, et seq. (M.S.A. §§26.331, et seq.). (Subsequently, upon stipulation of the parties, Count III was dismissed solely as to Brighton Mall Apartments [R28].)

In Counts III and IV, the counts against Brighton Mall Apartments and Lawrence Properties, Inc., Petitioners sought to invoke the pendent jurisdiction of the District Court (R6-R7; R32). Subsequently, the two pendent defendants (who are the Respondents in this proceeding) moved for summary judgment (R18 and R23). After those motions were filed, this Court decided *Aldinger* v *Howard*, 427 U.S. 1, 96 S. Ct. 2413, 49 L.Ed.2d 276 (1976). Based upon that decision, Magistrate Paul Komives, in a Memorandum Opinion (R31-R40), recommended that "this [District] Court cannot exercise its pendent jurisdiction

[5] See note 3, *supra*.

over the defendants Lawrence and Brighton and, therefore, they should be dismissed from the lawsuit" (R38). District Judge Lawrence Gubow adopted the Magistrate's Memorandum Opinion and dismissed the lawsuit as to the Respondents (R41-R42). Following entry of a Rule 54(b) Certificate (R43), the Petitioners took an appeal to the Sixth Circuit from the Order of Dismissal (R44).

On June 13, 1979, the Sixth Circuit issued an Order affirming the District Court. In its Order, that Court stated:

> "*The court is of the opinion that the district court had no power to exercise jurisdiction over appellees.* Pendent jurisdiction cannot be used, except in possible limited circumstances not present here, to obtain jurisdiction over a party not otherwise subject to federal court jurisdiction. *Aldinger* v *Howard*, 427 U.S. 1 (1976). Nor can Federal Rule of Civil Procedure 64 provide an independent basis for jurisdiction." (Emphasis added.)

Subsequently, the Court of Appeals denied a petition for rehearing. However, its Order denying the petition for rehearing amended the original Order by deleting the sentence in its original Order which stated that "the court is of the opinion that the district court had no power to exercise jurisdiction over appellees." The Sixth Circuit made this amendment "in order to remove any potential conflict between the decision in this cause and the decision in *Bricklayers Fringe Benefit Funds* v *North Perry Baptist Church*, 590 F.2d 207 (6th Cir. 1979)."[6]

REASONS FOR GRANTING THE WRIT

The holding below, as it applied to an industry as fragmented and interdependent as the construction industry,

[6] Petition for Writ of Certiorari filed May 24, 1979. No. 78-1758.

represents a serious diminution of the protection of workers' rights by the federal judiciary and, as it involves collection of amounts employers have been found to owe to fringe benefit programs, deprives fiduciaries of those programs of a needed device to do that which ERISA, 29 U.S.C. §§1001, et seq., commands to protect workers and their families.

1. The problems inherent in the construction industry are well known. See, e.g. Judge (now Solicitor General) McCree's opinion for the Sixth Circuit in *General Insurance Company of America* v *Lamar Corporation,* 482 F.2d 856, 860 (1973).[7] Many construction firms have little capital. Small firms which handle only one job at a time (a not untypical situation) cover all of their overhead with revenues from that job (or out of profits from earlier jobs). Indeed, one of the things peculiar to the construction industry is that financing is outside the control of contractors. Financing is obtained from, or through, the owner. See Abrams, "The Residential Construction Industry," in Adams (ed.), *The Structure of American Industry,* pp. 114, 117, 123-24 (The Macmillan Company, New York, N.Y., 2d ed. 1954), and Lefkoe, *The Crises in Construction,* pp. 30-43 (The Bureau of National Affairs, Inc., Washington, D.C., 1970).

It is because of this situation that the Federal government and all states including Michigan have enacted statutes, such as the Miller Act, 40 U.S.C. §§270a, et seq., and the mechanics lien statute, imposing derivative liability for labor and labor related claims in the construction industry. The purpose of each is to impose responsibility for pay-

[7] The Sixth Circuit was recently faced with construction industry problems in *Selby* v *Ford Motor Company,* 590 F.2d 642 (Jan. 11, 1979), and the problems were discussed at some length at pp. 647-48.

ment of such claims on the person who actually controls the purse strings. If an employer for any reason does not pay all of his labor obligations, the party who benefited from the labor is derivatively liable.

It is obvious that the claim against the Respondents (the pendent defendants) and the claim against the employer are related. Absent the claim against the employer, there would be no claim against the Respondents. If the employer had satisfied that portion of the claim which accrued on the Respondents' project, then Petitioners claim against the Respondents would also be satisfied.

The "commonsense policy of pendent jurisdiction" is, this Court has stated, "the conservation of judicial energy and the avoidance of multiplicity of litigation." *Rosadio* v *Wyman,* 397 U.S. 397, 405, 90 S. Ct. 1207, 25 L.Ed.2d 442 (1970). For the doctrine to be applicable, the "state and federal claims must arise from a common nucleus of operative fact. But if considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceedings, then assuming substantiality of the federal issues, there is *power* in federal court to hear the whole." *United Mine Workers* v *Gibbs,* 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L.Ed.2d 218 (1966) (footnote omitted).

As has been indicated, there is such a relationship between the federal and pendent claims here. The federal claim arose pursuant to a collective bargaining agreement the employer had entered into with the Carpenters' Union. Absent that agreement, the employer would not have been liable to Petitioners. Absent such liability, the Respondents would have no derivative liability to Petitioners.

Petitioners in this case are a group of trust funds established under federal law for the sole and exclusive purpose

of providing pension, medical, dental, hospital, optical, pooled holiday pay, disability and other forms of union-negotiated security programs for carpenters and their families and the union which represents those carpenters.

Each trust fund is controlled by a Board of Trustees, half of whom are selected by the union and half by the employers. The programs they administer are the results of collective bargaining. They have been subject to the relevant strictures of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §§141, et seq.,[8] since their inception.

The assets of the funds are composed entirely of employer contributions and the income generated from investment of those contributions. The ability of the Funds to provide the types of benefits bargained for rests upon collection of the sums due as contributions. The rate of contribution is set by collective bargaining and the agreements setting out the rates are enforceable under Section 301 of LMRA, 29 U.S.C. §185. This lawsuit was instituted pursuant thereto.[9]

As in all 301 litigation, the applicable law is federal law "which the courts must fashion from the policy of our national labor laws." *Textile Workers Union of America* v *Lincoln Mills of Alabama,* 353 U.S. 448, 456-57, 77 S. Ct. 912, 1 L.Ed.2d 972 (1957).

> "The Labor Management Relations Act expressly furnishes some substantive law. It points out what parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." *Textile Workers* v *Lincoln Mills, supra,* 353 U.S., at 457, citation omitted.

[8] Particularly Section 302(c)(5) of LMRA, as amended, 29 U.S.C. §186(c)(5), added to the statute 30 years ago as part of the Taft-Hartley amendments.

[9] By virtue of Section 502(e)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(e)(1), the Federal District Courts have exclusive jurisdiction of civil actions brought against employers under that act, including those to recover fringe benefit contributions.

The fashioning, after more than 20 years, continues.

The national labor policy in respect to employee benefit plans has evolved over the years through legislation, administrative regulation and judicial decision. The most recent Congressional expression of policy is the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1001, et seq. ERISA regulates virtually every aspect of the operation and structure of funds such as those involved here.[10] Its principal purpose is to set standards and a system of regulation which will safeguard the accrued benefits of participant employees and their families.

[10] ERISA specifically preempts all state laws dealing with fiduciary responsibility, reporting and disclosure, vesting, funding and related matters to the full extent such laws might otherwise affect pension and welfare benefit plans. ERISA §514(a), 29 U.S.C. §1144(a). It forbids any state to classify these plans as insurers, banks, trust companies or investment companies in order to bring them within state statutes regulating such institutions. ERISA §514(b)(2)(B), 29 U.S.C. §1144(b)(2)(B). ERISA enforcement is the responsibility of both the Department of Labor and the Internal Revenue Service, which have supplemented the statute with an impressive array of regulations and other interpretative materials (e.g., see footnote 11, *infra*). In fact, new sections were added to the Internal Revenue Code by ERISA which relate only to plans of the sort involved in this litigation, E.g., ERISA §1014, 26 U.S.C. §413; ERISA §1015, 26 U.S.C. §414; ERISA §2003(a), 26 U.S.C. §4975. The federal concern with, involvement in and regulation of such funds may fairly be characterized as pervasive.

> "It is hereby declared to be the policy of this Act *to protect* interstate commerce and *the interests of participants in employees benefit plans and their beneficiaries,* by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans, and *by providing* for appropriate remedies, sanctions and *ready access to the Federal courts*" (emphasis added). ERISA §2(b), 29 U.S.C. §1001(b).

Multi-employer plans, such as those involved in the instant case are specifically included in ERISA's coverage (29 U.S.C. §1002(37) (A)). The Trustees are fiduciaries whose duties and liabilities are defined, for the first time, by federal law. It is part of that duty to use every means available to them (which means the courts—no other means being available) to collect delinquent contributions and, except for limited situations specifically covered by regulation, they risk personal liability for deviation from that duty.[11]

It is part of national labor policy to allow enforcement of collective bargaining agreements in federal courts. That is what 301's minimum meaning is.

The teaching of *Lincoln Mills* is that Section 301 is more than a simple grant of jurisdiction. It carries with it federal substantive law fashioned to effectuate national labor policy, beginning (but not ending) with the texts of the relevant statutes. This is because, as this Court has stated,

[11] See Prohibited Transaction Exemption 76-1 (1976 P-H Inc. Pension ¶110,083) in which the Department of Labor, exercising its regulatory authority under ERISA, interprets Section 406(a)(1)(B) of the Act, 29 U.S.C. §1106(a)(1()B), to require collectively bargained multi-employer funds, *as a matter of federal law,* to make "systematic, reasonable and diligent efforts to collect delinquent contributions."

the section "implements no more than the established doctrine that the union's role in the collective bargaining agreement does not end with the making of the contract" and that "one of the widely recognized purposes of Congress in enacting Section 301 [was to eliminate] common-law procedural obstacles to suits for breach of collective bargaining agreements. [Citations omitted.]" *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v *Hoosier Cardinal Corporation,* 383 U.S. 696, 699-700, 86 S. Ct. 1107, 16 L.Ed.2d 192 (1966).

The protection of employee rights in pension and welfare benefit programs and collection of the money contracted for (and needed) to finance properly those programs is a part of that national labor policy. A remedy must be fashioned to "effectuate that policy". This Court has suggested sources:

> "The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of federal law will govern, not state law. But state law, if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." *Textile Workers* v *Lincoln Mills, supra,* 353 U.S., at 457, citations omitted.

Collection of amounts due to employee pension and welfare programs such as those involved here will not be effectuated, it will be impeded, if the District Court's order of dismissal is allowed to stand. Contrary to *Lincoln Mills,* the remedies required to effectuate the national labor policy in this regard will not be "absorbed as federal law", but

will be sliced off and relegated to the exclusive jurisdiction of the state court.

One of the primary Congressional purposes in enacting LMRA §§301 and 302 and the Employee Retirement Income Security Act of 1974, was to protect the wages and fringe benefits of employees.[12] To sanction the District Court's refusal to exercise its jurisdiction ignores the realities of the construction industry and flies in the face of that expressed Congressional purpose. When a construction employer is found to have failed to pay the promised contributions to provide pension and welfare benefits, the remedy must include the right to levy upon and collect from those who actually hold the money, the customers, the financing agencies and the general contractors. It is neither beyond the power of the federal courts nor "the range of judicial inventiveness" required by *Lincoln Mills* to fashion an effective, not an illustory or partial, remedy. In dismissing the pendent claim, the District Court abused its discretion.

2. *Aldinger* v *Howard, supra,* contrary to the panel's decision, is neither dispositive of the issue involved in this appeal nor does it lend any support for the panel's conclusion that pendent jurisdiction could not be used in this case to obtain jurisdiction over Respondents.

In *Aldinger,* the federal count was predicated on the Federal Civil Rights Act. In that case, unlike the situation involved herein, the Court's reading of Section 1983 of Title 42 showed that Congress intended to exclude the particular type of pendent defendant (a county) as a party defendant

[12] See Judge Joiner's decision in *Central States Southeast and Southwest Areas Pension Fund, et al.* v *Hitchings Trucking, Inc., et al.,* .... F. Supp. ...., 251 BNA Pension Law Reporter D-1 (E.D. Mich., July 20, 1979).

in a Section 1983 lawsuit. In this case, not only is there no such Congressional intent but, it appears to us at least, Federal Rule of Civil Procedure 64, which has been sanctioned by the Congress, leads one to the conclusion that pendent parties should be left in the lawsuit so that the plaintiffs herein will have an effective remedy. Indeed, *Textile Workers of America* v *Lincoln Mills of Alabama, supra,* mandates that the District Courts effectuate the statutory policy which led to the enactment of LMRA §301 and ERISA and insure, where possible, that plaintiffs are given an effective remedy. While it is true that federal law is the governing law, as the Court pointed out in the *Lincoln Mills* case, state law, if compatible with the purpose of the federal statute, may be resorted to in order to find the rule that will best effectuate federal policy.

Additionally, unlike the situation in the *Aldinger* case, the grant of jurisdiction in this matter to the District Court over the federal claim was exclusive by virtue of ERISA §502(e) (1), 29 U.S.C. §1132(e)(1).[13] And, as we have previously stated, the fact that the grant of jurisdiction is exclusive is not a mere happenstance.[14]

3. Petitioners, both in the District Court and the Court of Appeals, also argued that the mechanics' lien foreclosure claim fell within the remedies contemplated by Rule 64 of

[13] For examples of port-*Aldinger* exercise of pendent party jurisdiction in situations where federal courts had *exclusive* jurisdiction over the federal counts, see *Ortiz* v *United States Government* 595 F.2d 65 (C.A. 1, 1979), *Dick Meyers Towing Service, Inc.* v *United States,* 577 F.2d 1023 (C.A. 5, 1978), *Transok Pipeline Co* v *Darks,* 565 F.2d 1150 (C.A. 10, 1977), and *Pearce* v *United States,* 450 F. Supp. 613 (D. Kan., 1978). The federal counts in *Pearce* and *Ortiz* involved the Federal Tort Claims Act. The Ninth Circuit has, of course, reached the contrary result and has refused to allow exercise of pendent party jurisdiction under any circumstances. See, e.g., *Ayala* v *United States,* 550 F.2d 1196 (1977).

[14] See note 10, *supra.*

the Federal Rules of Civil Procedure. Rule 64 provides in relevant parts that:

> "At the commencement of and during the course of an action, all remedies providing for seizure of . . . property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, ... The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, *and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.*" (Emphasis added)

The Court of Appeals rejected this contention, stating that the rule does not "provide an independent basis for jurisdiction." While this may very well be true, the rule was not used for that purpose. It was used to proceed against the persons who were derivatively liable for the employer's indebtedness, such derivative liability having been statutorily imposed because these persons (the pendent defendants) were the ones who controlled the money.

4. The actions of the District Court and the Court of Appeals serve no policy consideration. The sole result will be to place one more hurdle in the already difficult path of enforcing the claims of laborers in the construction industry for bargained-for wages and fringe benefits. The actions of the court below benefit the Respondents not one iota. If sustained by this Court, the inevitable result will be refiling in a state court. As a general policy consideration, the inevitable consequence of the decision of both courts below will be that a multiplicity of lawsuits (with

their attendant large costs) in different courts will be required to collect the varying portions of the identical construction industry labor claim. This will hardly assure the stability and protection which Congress sought when it enacted ERISA. As one District Court said:

> "ERISA was intended to stabilize the rights and liabilities involved in pensions established by collective bargaining. Congress in its findings and declaration of policy provided:
>
> " 'The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation and administration of such plans . . . that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided

assuring the equitable character of such plans and their financial soundness.' 29 U.S.C. §1001(a).

"Stability and protection requires assurance of adequate funding and the prevention of arbitrary termination rights. ERISA protects employees' rights to pension funds under pension trusts if the employees qualify. 29 U.S.C. §§1052, 1053 and 1054. Whether payments to the trust have or have not been made by the employer is not relevant in the determination as to whether or not an employee qualifies. See Labor Department Advisory Opinion Letter on Delinquent Contributions dated August 31, 1976, Opinion 76-89, 221 BNA Pension Reporter R-24.
* * * *

"A ruling by this court in an action between the employer and the fund could not adversely affect the rights of the employees to make claims against the fund when they became due, regardless of whether the employer has made payments or whether this court would have ordered the employer to make payments. It is not unlikely that they might prevail on the same theory that is being asserted in this case by the plaintiff.

"A ruling adverse to the plaintiff in this court would place the plaintiff in an anomalous position. It would have no defense whatsoever to the claims being made by the employees. As a result of this decision, it would be required to meet the financial burden of ERISA's guarantees in the form of penson payments without corresponding contributions to the defendant's employees and similarly situated employees. As the plan covers several hundred thousand participants, with over 1400 contributing employers, the actuarial soundness of the fund would be compromised." *Central States Southeast and Southwest Areas Pension Fund, et al.* v *Hitchings Trucking, Inc., et al., supra.*

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,
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Dated: September 10, 1979.

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARPENTERS DISTRICT COUNCIL OF DETROIT, WAYNE, OAKLAND AND MACOMB COUNTIES AND VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, a voluntary unincorporated labor association, et al.,
Plaintiffs, Civil No. 5-70007

vs.

GEORGE E. MORSE, individually and d/b/a RESIDENTIAL FRAMERS COMPANY, et al.,
Defendants.

MEMORANDUM OPINION

The Court has before it defendant Brighton Mall Apartments' (hereinafter "Brighton") amended Motion for Summary Judgment; defendant Lawrence Properties, Inc.'s (hereinafter "Lawrence"), Motion for Summary Judgment; and plaintiffs', Carpenters District Council and United Brotherhood of Carpenters and Joiners of America, Motion to Dismiss and/or Strike certain parts of defendant Lawrence's pleadings. The parties have stipulated to my hearing and deciding these matters.

After oral argument on these motions was held, but before the Court could issue a Memorandum Opinion and Order it had partially prepared which treated them, the Supreme Court issued its opinion in *Aldinger* v *Howard,* 44 U.S.L.W. 4988 (U.S. June 22, 1976). The Court was confronted with the possibility, that on the basis of Aldinger and, possibly, the recent decision by the Sixth Circuit in *Saalfrank* v *O'Daniel,* 533 F.2d 325 (6th Cir. 1976), the plaintiffs' cause of action against all the defendants except George E. Morse, and defendant Lawrence's counterclaim and crossclaim should be dismissed on the ground that this Court lacked any pendent jurisdiction over them. Accordingly, the Court ordered the parties to show cause as to why these pleadings and counts should not be dismissed and provided an opportunity for further briefs and oral argument. The parties waived oral argument, but submitted supplemental briefs. This Memorandum Opinion is my report and recommendation in this case. It is being submitted to Judge Gubow so that the District Judge after consideration of the entire record in this case, including this Memorandum Opinion, may make a dispositive ruling on the Motions.

I. *BACKGROUND*

This action arises out of plaintiffs' attempts to recover monies allegedly owing to its fringe benefit fund. Plaintiffs are a union and that union's fringe benefit fund; defendants are Brighton, the owner of the property upon which plaintiffs' members performed their work, Lawrence, the project's general contractor, and George E. Morse, doing business as Residential Framers Co. (hereinafter "Morse").

Plaintiffs filed their complaint in January, 1975, basing jurisdiction of this Court on 29 U.S.C. Sec. 185 for count one, and the doctrine of pendent jurisdiction for counts two, three, and four. On August 14, 1975, Morse was adjudicated a bankrupt and all proceedings against him were stayed under rule 401(a) of the Bankruptcy Rules and 11

U.S.C. Sec. 29(a). Morse had not answered plaintiffs' complaint or a cross-claim by Lawrence so, on June 30, 1975, plaintiffs sought and the clerk entered a default against him. Lawrence also sought an entry of default, but because of an "erroneous affidavit" the clerk refused its request.

Count one of plaintiffs' complaint alleges that Morse, pursuant to the collective bargaining contract between Morse and plaintiffs, was obligated to make payments into plaintiffs' fringe benefit fund; that Morse failed to make the payments; and Morse now owes plaintiffs a sum of $10,521.32. Count Two alleges that the Michigan Builders Contract Fund Act (MBCFA), M.C.L.A. Sec. 570.151 *et seq.*, created a "trust fund, for the benefit of . . . laborers" in the monies received by Morse to build the project; that Morse was the trustee "of all funds so paid to him for building construction purposes", and, therefore, that Morse's refusal to pay the indebtedness is conversion to the extent of $10,521.32. Count there alleges that Lawrence violated the MBCFA by its neglect or refusal to pay "the 'building contract fund' . . . when it either knew, or should have known," that Morse had not done so. Brighton was similarly included in count three, but a stipulation by the parties has since dismissed Brighton from this count. Finally, count four, naming Brighton, Lawrence, and Morse, alleges that plaintiffs have properly followed the procedures of M.C.L.A. Sec. 570.1 *et seq.*, and now have on file a valid mechanic's lien which they intend to enforce. Plaintiffs seek the sale of the property and use of the proceeds to satisfy the debt.

Brighton answered plaintiffs' complaint, specifically count four, by admitting that plaintiffs had a mechanic's lien on file, but alleging that improper procedures used in filing made it invalid. Lawrence answered by asserting that

no pendent jurisdiction existed, and that, as to count three, it entered into an accord and satisfaction with plaintiffs for any liabilities or obligations that it would owe through Morse. Lawrence also raised a number of affirmative defenses.

On June 16, 1975, Lawrence filed a counterclaim against the plaintiffs. Count one alleges that on September 10, 1974, plaintiffs and Lawrence entered into an agreement whereby Lawrence would pay $8,000 to plaintiffs and plaintiffs would release Lawrence from "any and all liability [resulting from] any relationship" between Lawrence and Morse. Lawrence, therefore, seeks an order rescinding the accord and satisfaction and forcing plaintiffs to repay the $8,000, because plaintiffs have failed to cease efforts to collect against Lawrence. Count two seeks $75,000 in damages resulting from plaintiffs' efforts to collect against Lawrence (*e.g.*, loss of business reputation and business relationships). Finally, count three seeks $25,000 actual damages and $50,000 punitive damages for wrongful interference with Lawrence's business when plaintiffs allegedly violated 29 U.S.C. Secs. 185, 187 by secondarily boycotting Lawrence, a neutral employer.

Lawrence has also filed a crossclaim against Morse. Count one alleges that Lawrence has two contracts with Morse such that Morse would supply labor and materials to Lawrence. Morse allegedly breached both agreements by failing to properly complete work pursuant to the contract, failing to do certain portions of work, failing to progress with work according to the contract, and failing to pay employees certain wages and benefits. Lawrence seeks $19,894.27 in damages to cover the increased costs it incurred to complete the work. Count two seeks a judgment against Morse to indemnify Lawrence for any amount

it may end up paying to plaintiffs because of Morse's indebtedness.

In January, 1976, plaintiffs answered Lawrence's counterclaim and alleged that it accepted $8,000 from Lawrence, but that it was understood that the $8,000 would be applied toward amounts owed by Morse.

II. *PENDENT JURISDICTION*

The plaintiff in *Aldinger* brought an action based on section 1983 and certain state laws against the county, its treasurer, and various county officials, alleging that her discharge without a hearing from her county job deprived her of constitutional rights. The district court dismissed the county from the action because it was not a "person" within the meaning of section 1983 and, therefore, no independent basis of jurisdiction existed over it. The Court of Appeals affirmed the dismissal; on appeal, the Supreme Court upheld the Court of Appeals. The Court in *Aldinger* squarely addressed the question "whether the doctrine of pendent jurisdiction extends to confer jurisdiction over a party as to whom no independent basis of federal jurisdiction exists." 44 U.S.L.W. at 4989. In holding that jurisdiction does not attach to such a party, the Supreme Court stated, and this Court quotes at length, that:

> The situation with respect to the impleading of a new party . . . strikes us as being both factually and legally different from the situation facing the Court in [*United Mine Workers* v *Gibbs*, 383 U.S. 715, 726-27 (1966] and its predecessors. From a purely factual point of view, it is one thing to authorize two parties already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim

> a state law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of a state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact." *Ibid.* True the same considerations of judicial economy would be served insofar as plaintiff's claims "are such that he would ordinarily be expected to try them all in one judicial proceeding. . ." *Ibid.* But the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress. We think there is much sense in the observation of Judge Sobeloff, writing for the Court of Appeals in *Kenrose Mfg. Co., Inc.* v *Fred Whitaker Co.*, 512 F.2d 890, 894 (CA 4 1972):
>
> "The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction. Especially is this true where, as here, the efficiency plaintiff seeks so avidly is available without question in the state courts."
>
> There is also a significant legal difference. In *Osborn* v *Bk. of the United States*, 22 U.S. (9 Wheat.)

738 (1824)] and *Gibbs* Congress was sielnt on the extent to which the defendant, already properly in federal court under a statute, might be called upon to answer non-federal questions or claims; the way was thus left open for the Court to fashion its own rules under the general language of Art. III. But the extension of *Gibbs* to this kind of "pendent party" jurisdiction—bringing in an additional defendant at the behest of the plaintiff—presents rather different statutory jurisdictional considerations. Petitioner's contention that she should be entitled to sue Spokane County as a new third party, and then to try a wholly state law claim against the county, all of which would be "pendent" to her federal claim against respondent county treasurer, must be decided not in the context of congressional silence or tacit encouragement, but in quite the opposite context. The question here, which was not necessary to address in *Gibbs* or *Osborn,* is whether by virtue of the statutory grant of subject-matter jurisdiction, upon which petitioner's principal claim against the treasurer rests, Congress has addressed itself to the *party* as to whom jurisdiction pendent to the principal claim is sought. And it undoubtedly has done so.

But the question whether jurisdiction over the instnat lawsuit extends not only to a related state law claim, but to the defendant against whom that claim is made, turns initially not on the general contours of the language in Art. III, *i.e.,* "Cases . . . arising under," but upon the deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to

federal courts. . . . In short, as against a plaintiff's claim of *additional* power over a "pendent party," the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress.

Resolution of a claim of pendent party jurisdiction, therefore, calls for careful attention to the relevant statutory language. . . .

44 U.S.L.W. at 4992-93 (emphasis in original).

In the case now before the Court, the plaintiffs have brought claims based only on state law against two defendants, Brighton and Lawrence, and have brought claims against defendant Morse based on 29 U.S.C. Sec. 185 (count one), and the Michigan mechanic's lien law (count four). Thus, as in *Aldinger,* no independent basis for federal jurisdiction exists over two of the defendants, Lawrence and Brighton. Although plaintiffs argue that their claims arise from "a common nucleus of operative fact," this is not the sole consideration of a district court in assessing the presence or absence of its jurisdiction. As noted by Judge Sobeloff, and quoted by the Court in *Aldinger,* this is especially true when, as in this matter, all the claims could have been brought in a state court. The mechanic's lien law claims, the MBCFA claims, and the claims contained in the counter and crossclaims of defendant Lawrence could certainly have been filed in a Michigan court, as could the action against Morse under section 185, 29 U.S.C., for breach of the collective bargaining contract. *See, e.g., Thomas* v *Consolidated Coal Co.,* 380 F.2d 69, 76 & n. 7 (4th Cir.), *cert. denied,* 389 U.S. 1004 (1967) (holding that an action cognizable under section 185 could be brought in either state or federal court).

Therefore, as noted by the Court in *Aldinger,* the "significant legal question" that must be considered in this case is whether or not the statutory grant of subject matter jurisdiction in section 185 addresses itself to the parties as to whom pendent jurisdiction is sought, here Brighton and Lawrence. Or, to put it another way, whether or not section 185 evidences any congressional intent to allow federal court's to take jurisdiction over pendent parties such as Brighton anr Lawrence. I think this section does not reach these parties.

In *Aldinger,* the Court found that, because section 1983 excluded counties from liability, a pendent party could "argue with a great deal of force that the scope of" a civil action over which a court has jurisdiction based on 28 U.S.C. Sec. 1334(3), "should not be so broadly read as to bring them *back* within that power merely because the facts also give rise to an ordinary civil action against them under state law." 44 U.S.L.W. at 4993 (emphasis in original). In the case at bar, the same principle applies.

Section 185 provides federal courts with jurisdiction only over "[s]uits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations . . ." The reach of this statute does not extend to the various state law claims brought by the plaintiffs in their complaint or by the defendant Lawrence in its counter- and crossclaim—it reaches only suits for breach of a collective bargaining contract. Furthermore, the statute does not reach the pendent parties in this action, Lawrence and Brighton—it reaches only labor organizations and employers with a contractual relationship, or labor organizations with contractual relationships with each other. Therefore, because neither Brighton nor Lawrence come within the ambit of section 185's jurisdictional grant, this

Court's pendent jurisdiction should not be so expansively construed as to drag defendants within this Court's power "merely because the facts also give rise to an ordinary civil action against them under state law." This is true because the plaintiffs could have brought their entire action before a Michigan court of general jurisdiction.

It is my recommendation that on the basis of the Supreme Court's decision in *Aldinger,* this Court cannot exercise its pendent jurisdiction over the defendants Lawrence and Brighton and, therefore, they should be dismissed from the lawsuit. For the same reasons, Lawrence's counter and crossclaims should be dismissed. The plaintiffs retain their cause of action in counts one and four against the defendant Morse.

There being "no just reason for delay" I would also grant plaintiffs' request that a Rule 54(b), FRcivP., entry of judgment be made allowing plaintiffs to appeal, if they so desire, any decision by Judge Gubow that dismisses Lawrence and Brighton from this lawsuit.

Finally, it should be noted that a slight procedural error by the plaintiffs in naming the fringe benefit trust fund itself, rather than the trustees of that fund, as a plaintiff warrants comment.

Plaintiffs are a union and the union's fringe benefit trust fund. It has been held that suits involving a union trust fund must be brought by or against the trustees of that fund, not against the fictional entity. *Pignotti* v *Local #3 Sheet Metal Workers Int'l Ass'n,* 343 F. Supp. 236, 242 (D. Neb. 1972), *aff'd,* 477 F.2d 825 (8th Cir.), *cert. denied,* 414 U.S. 1067 (1973); *Nedd* v *United Mine Workers of Am.,* 400 F.2d 103, 107 (3d Cir. 1967); *Warshaw* v *Local 415, Int'l Ladies' Garment Workers' Union,* 325 F.2d 143, 145 (5th Cir. 1963); *Dersch* v *United Mine Workers of Am.*

Welfare & Retirement Fund, 309 F. Supp. 395, 396 (S.D. Ind. 1969); *Yonce* v *Miners Memorial Hosp. Ass'n*, 161 F. Supp. 178, 188 (W.D. Vir. 1958); 48 Am. Jur. 2d *Labor and Labor Relations* Sec. 225 (1970). This procedural faux pas does not, however, warrant dismissal of plaintiffs' claim. *See* FRCivP 17(a). Plaintiffs, therefore, should be given fifteen days from entry of any opinion or order by Judge Gubow that is in conformity with this opinion to amend its complaint by naming the trustees of the fringe benefit fund as plaintiffs. Section 185, 29 U.S.C., supports the jurisdiction of a federal district coutr in actions by the trustees of union benefit trust funds to recover unpaid benefits. *Calhoun* v *Bernard*, 359 F.2d 400 (9th Cir. 1966); *Hann* v *Harlow*, 271 F. Supp. 674, 675 (D.D.C. 1967); *Thomas* v *Reading Anthracite Co.*, 264 F. Supp. 339, 340-42 (D.D.C. 1966).

As to the propriety of the union as a party plaintiff, it has been held that the "right of action to recover from an employer contributions due from him to a union welfare fund has been held to belong to the trustees and not to the union." 48 Am. Jur. 2d *Labor and Labor Relations* Sec. 225 (1970). In this case, however, the collective bargaining agreement in effect while the project was being completed provides that an employer failing to make contributions to the fringe benefit fund is delinquent and

> the employees or their representatives shall take such action as necessary, forthwith, to collect such delinquent payments . . . .

1974-1976 Agreements art. VI, par. 10, at 17. This language allows the union, as a representative of the employees, to stand in the shoes of the employees it represents to collect fringe benefits via a court action. Therefore, at least for

purposes of count one of the complaint which names Morse, a party to the collective bargaining contract, the union is a proper party plaintiff.

It should also be noted here that the collective bargaining agreement allows

> Trustees of the fringe benefit fund [to] require any Employer who has been frequently delinquent in making such contributions . . . to comply with the provisions of paragraphs 9 and 10 of this Article VI [requiring an employer to pay fringe benefits that are due each pay period].

1974-1976 Agreements art. VI, par. 12, at 17-18. Thus, the employees, by virtue of the collective bargaining agreement, have in effect, assigned their right to collect these benefits to both the union and the trustees of the fringe benefit fund. *Cf. United States* v *Carter*, 353 U.S. 210, 219-20 (1957).

CONCLUSION

I recommend that the Court enter an order dismissing Brighton Mall Apartments and Lawrence Properties, Inc. as defendants in this case. I recommend further that the counter- and crossclaims of defendant Lawrence be dismissed as well. The dismissal should specify that the order is entered because the Court lacks jurisdiction over these parties as to the subject matter of the causes of action asserted.

I recommend further that the order of dismissal contain language which specifically grants plaintiffs' request that a Rule 54(b), FRCivP, entry of judgment be made to allow an immediate appeal.

I recommend further that plaintiff be given 15 days from entry of such an order to amend its complaint by naming the trustees of the Fringe Benefit Fund as plaintiffs.

The parties are given 10 days from the date of filing of this report to file objections and exceptions with the District Judge. A failure to file objections or exceptions shall not be deemed a waiver of any position previously asserted, but on the contrary it is presumed that the parties persist in the positions previously taken. Thereafter, it is expected that the District Judge will rule upon the motions after such review of the papers, including this Memorandum Opinion, as he may deem appropriate.

Respectfully submitted,
/s/ PAUL J. KOMIVES
United States Magistrate

Dated: September 27, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARPENTERS DISTRICT COUNCIL OF DETROIT, WAYNE, OAKLAND AND MACOMB COUNTIES AND VICINITY; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and DETROIT CARPENTERS FRINGE BENEFIT FUNDS,
Plaintiffs,

v.

GEORGE E. MORSE, individually and d/b/a RESIDENTIAL FRAMERS COMPANY; BRIGHTON MALL APARTMENTS, and LAWRENCE PROPERTIES, INC.,
Defendants.

Civil Action No. 75-70007

ORDER

At a session of said court held at Detroit, Michigan, this 18th day of October, 1976. PRESENT: Hon. Lawrence Gubow U. S. District Judge

This case came on for hearing before the U. S. Magistrate, Paul J. Komives, at the stipulation of the parties; the Magistrate heard the arguments and entered a written opinion and recommendation, including a provision that allowed the parties to enter objections to the opinion and recommendation; and the plaintiffs in this case did enter objections to the opinion. The court has reviewed the file in this matter, especially the briefs of the parties, the opinion and recommendation of the Magistrate, and the

objection to the Magistrate's opinion, and enters the following order based on the opinion issued by the Magistrate:

IT IS ORDERED that the motions for summary judgment brought by defendants, Brighton Mall Apartments and Lawrence Properties, Inc., be, and the same hereby are, GRANTED, the court lacking subject matter jurisdiction over these defendants;

IT IS FURTHER ORDERED that plaintiffs' motion to dismiss and/or strike certain parts of defendant Lawrence Properties, Inc.'s pleadings in this action need not be decided as it is now moot;

IT IS FURTHER ORDERED that the counter- and crossclaims of defendant Lawrence Properties, Inc. be, and hereby are, DISMISSED, the court lacking subject matter jurisdiction over those claims;

IT IS FURTHER ORDERED that plaintiffs, if they so choose, may consider this order an appealable order within the meaning of Rule 54(b), Fed. R. Civ. P.;

IT IS FURTHER ORDERED that the plaintiffs be given fifteen days from entry of this order, or, if plaintiffs appeal this matter pursuant to Rule 54(b), from the entry of an order by the United States Court of Appeals for the Sixth Circuit remanding this case back to this court, to amend its complaint by naming the trustees of the fringe benefit trust fund as plaintiffs;

IT IS FURTHER ORDERED that plaintiffs' request that the Notice of Lis Pendens, which will expire on January 8, 1978, be extended for another three year period pursuant to M.C.L.A. § 600.2715 and 600.2735, be, and hereby is, DENIED as premature. Plaintiffs may renew their request when the time for expiration of the Notice draws closer.

Plaintiffs' actions against defendant George E. Morse in Counts one and two of the complaint remain.

/s/ LAWRENCE GUBOW
U. S. District Judge

(Title of Court and Cause)

ORDER FOR RULE 54(b) CERTIFICATE

At a session of said Court held in the Federal Building, Detroit, Michigan, on the 20th day of October, 1976. PRESENT: HONORABLE LAWRENCE GUBOW, United States District Judge

In accordance with the Court's Order of October 18, 1976.

IT IS ORDERED that, with respect to such Order, the following Federal Rule of Civil Procedure 54(b) Certificate be, and it is hereby, issued:

RULE 54(b) CERTIFICATE

With respect to the issues determined by the Order of October 18, 1976, it is hereby CERTIFIED in accordance with Federal Rule of Civil Procedure 54(b) that:

1. The Court now directs entry of final judgment on all matters disposed of in said Order of October 18, 1976; and

2. The Court determines that there is no just reason for delay.

IT IS FURTHER ORDERED that the sixty (60) day period within which a notice of appeal may be filed, thereby initiating an appeal of said final judgment, shall commence on this date.

/s/ LAWRENCE GUBOW
United States District Judge

Dated: October 20, 1976

No. 77-1071

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARPENTERS DISTRICT COUNCIL OF DETROIT, WAYNE, OAKLAND AND MACOMB COUNTIES AND VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, a voluntary unincorporated labor association, and DETROIT CARPENTERS FRINGE BENEFIT FUNDS, a voluntary unincorporated trust fund,

Plaintiffs-Appellants,

v.

GEORGE E. MORSE, Individually and d/b/a RESIDENTIAL FRAMERS COMPANY, BRIGHTON MALL APARTMENTS, a Michigan Limited partnership, and LAWRENCE PROPERTIES, INC., a corporation incorporated under the laws of the State of Michigan,

Defendants-Appellees.

ORDER

Decided and Filed June 13, 1979

BEFORE: CELEBREZZE, ENGEL, KEITH, Circuit Judges.

Plaintiffs-appellants brought this action against a subcontractor, who subsequently petitioned for bankruptcy, and against defendants-appellees, the general contractor and the owner of the land upon which the construction occurred. The only jurisdiction alleged as to appellees was

based upon pendent state law claims inasmuch as appellants had not contracted with appellees and there was no independent federal jurisdiction over appellees. The district court declined to exercise pendent jurisdiction over appellees and ordered the appellees dismissed from the case.

The court has considered the briefs and oral arguments of counsel and has studied the record and is fully advised in the premises. The court is of the opinion that the district court had no power to exercise jurisdiction over appellees. Pendent jurisdiction cannot be used, except in possible limited circumstances not present here, to obtain jurisdiction over a party not otherwise subject to federal court jurisdiction. *Aldinger* v *Howard,* 427 U.S. 1 (1976). Nor can Federal Rule of Civil Procedure 64 provide an independent basis for jurisdiction.

Therefore, it is hereby ordered that the judgment of the district court be, and it hereby is, affirmed.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN,
Clerk

(Title of Court and Cause)

ORDER

Before: CELEBREZZE, ENGEL and KEITH, Circuit Judges.

Appellants have petitioned the court for rehearing, with a suggestion of rehearing en banc. No judge in active service having voted in favor of rehearing en banc, the petition has been referred to the hearing panel.

In order to remove any potential conflict between the decision in this cause and the decision in *Bricklayers Fringe Benefit Funds* v *North Perry Baptist Church*, 590 F.2d 207 (6th Cir. 1979), it is hereby ordered that the order in this cause be amended by deleting the following sentence: "The court is of the opinion that the district court had no power to exercise jurisdiction over appellees."

In all other regards, the petition for rehearing is without merit and is hereby denied.

It is so ordered.

ENTERED BY ORDER OF
THE COURT
/s/ JOHN P. HEHMAN
Clerk

Filed July 23, 1979